IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~842~~ 23

CALVIN TURNER, *et al.*,

*Appellants,*

—v.—

W. W. FOUCHE, *et al.*,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

## APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM

JACK GREENBERG
MICHAEL MELTSNER
10 Columbus Circle
New York, New York

HOWARD MOORE, JR.
PETER RINDSKOPF
859½ Hunter Street, N.W.
Atlanta, Georgia

*Attorneys for Appellants*

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### I.

In their motions to dismiss appellees challenge this Court's jurisdiction under 28 U.S.C. §1253 and invoke in support of their contention the doctrine of *Moody* v. *Flowers*, 387 U.S. 97, 102 (1968) where this Court vacated the judgment after finding a state statute "is not a statute of statewide application, but relates solely to the affairs of one county in the State". Appellees are not aided by this holding, however, for *Moody* does not require that allegations as to the unconstitutionality of a statutory scheme need derive their *proof* out of facts occurring in more than one county of a state. Nor did that case hold that other than county officials need be named as party defen-

dants where challenged statutes are "of statewide application." *Ibid.* In *Sailors* v. *Kent Board of Education*, 387 U.S. 105 (1967) decided the same day as *Moody*, this Court sustained three judge jurisdiction where officials of only one county were sued and the unconstitutional operation of the statutes were demonstrated in that county alone. Mr. Justice Douglas distinguished *Moody*, *supra* in language equally applicable to the instant case:

> We conclude that a three-judge court was properly convened, for unlike the situation in *Moody* v. *Flowers*, . . . this is a case where the state statute that is challenged [footnote omitted] applies generally to all Michigan County school boards of the type described (387 U.S. at 107.)

Appellees rely heavily upon *Ex Parte Collins*, 277 U.S. 565 (1928) and its citation in *Moody*, *supra*. *Moody* did not cite the *Collins* case, however, for the proposition that proof of unconstitutionality was required to emanate from state party defendants or from activity proved to have occurred in every part of a state. Such an interpretation of *Collins* and *Moody* cannot stand in light of the decision in *Sailors*. What in fact, does need to be shown is that the statutes attacked manifest an unconstitutional policy of statewide applicability. Clearly those requirements are satisfied in the instant case.

Appellants have challenged as inconsistent with the federal Constitution state statutes applicable to all the counties of the state of Georgia. In their jurisdictional statement appellants challenged, *inter alia*, Georgia Code Ann. Tit. 32 §902 which provides membership on county boards of education shall be restricted to freeholders and Georgia Code Ann. Tit. 59, §§101, 106, which require that jurors

be "upright and intelligent" and jury commissioners be "discreet". Thus, as the court below held, a three-judge court was properly convened under 28 U.S.C. §2281 because this is an action seeking, *inter alia*, to restrain state officials from enforcing state statutes of general application on the ground that they unconstitutionally (a) distinguish between the poor and propertyless and those who own real property by excluding the former from school board membership and (b) state requirements for jury and jury commission service with impermissible vagueness and overbreadth. See *e.g.*, *Flast* v. *Cohen*, 392 U.S. 83 (1968); *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713 (1962); *Query* v. *United States*, 316 U.S. 486 (1942). Although brought against local officials, this case is not a matter of purely local concern, because here relief is sought against the action of public officials, acting under challenged state statutes expressing the state's policy in relation to jury and school board selection. See *e.g.*, *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89 (1935); *Sailors* v. *Board of Education of the County of Kent*, *supra*. This is not merely an attack upon the "unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional." *Cf. Ex parte Bransford*, 310 U.S. 354, 361 (1940) (dictum).

Nor do 28 U.S.C. §§1253, 2281, as the state of Georgia appears to urge, require that a statute be challenged on the ground that it discriminates explicitly on the basis of race for a three-judge court to have jurisdiction. *Louisiana* v. *U.S.*, 380 U.S. 145 (1965). A challenge to a statutory scheme on the basis that it presents local officials with "opportunity for discrimination" clearly raises a substantial question of unconstitutionality. *Whitus* v. *Georgia*, 385 U.S. 545, 552 (1967); *Louisiana* v. *U.S.*, *supra*. The substantiality of the question is highlighted by the fact that

on several occasions in the past 16 years this Court has found itself compelled to reverse or remand convictions on the ground that an opportunity to discriminate was resorted to by county officials of the state of Georgia. E.g. *Whitus, supra; Anderson* v. *Georgia,* 390 U.S. 206 (1968); *Cobb* v. *Georgia,* 389 U.S. 12 (1967); *Avery* v. *Georgia,* 345 U.S. 559 (1953); *Williams* v. *Georgia,* 349 U.S. 375, 391-392 (1955). Appellants have shown by their proof as to Taliaferro County that it is anything but frivolous to allege that discrimination against Negroes in jury selection is permitted, and even invited[1] by Georgia law. Nor is it frivolous to allege that a political process which operates to dilute and to limit participation of Negroes violates the United States Constitution, *Dusch* v. *Davis,* 387 U.S. 112, 117 (1967). As previously shown, the fact that proof of the dilution is derived from the operation of the statewide scheme in one county does not remove the claim from the three-judge requirement, *Sailors, supra.*

## II.

The state also argues that appellant Turner has no standing to challenge the statutory exclusion of non-freeholders from school board membership because he is a freeholder. The district court, however, permitted intervention of Joseph Heath, a father of several school children and non-freeholder, who plainly possessed requisite standing to challenge a statute which prohibited him from serving on the county school board. The court permitted intervention after appellees' counsel stated that he had no objection "to make certain that the Court will reach the merits of

[1] See *South Carolina* v. *Katzenbach,* 383 U.S. 301, 312-313 (1966

the claim
stitution



application based on freeholders is uncon-
3, 134).

Respectfully submitted,

JACK GREENBERG
MICHAEL MELTSNER
10 Columbus Circle
New York, New York

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859½ Hunter Street, N.W.
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